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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 463.

CHARLES J. WOLFE, *Petitioner,*

vs.

C. F. MURPHY, ET AL., *Respondents.*

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SUCH RESISTANCE.

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RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

To the Hon. Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents C. F. Murphy, M. X. Geske, George B. Richter, and F. E. Sharpe, respectfully resist the petition herein for a Writ of Certiorari to review the judgment and decree of the United States Circuit Court of Appeals of the Eighth Judicial Circuit and show the Court that no question of local law has been decided by said Circuit Court of Appeals in any way in conflict with applicable local decisions but on the contrary the decisions both of the United States District Court for the Northern District of Iowa and the Circuit Court of Appeals of the Eighth Judicial Circuit herein were strictly in accordance with the local law and with the statutes and decisions of the State of Iowa.

Petitioner as plaintiff brought this action against respondents as a civil action for damages for alleged malicious prosecution. Defendants interposed a plea of the Stat-

ute of Limitations. The events upon which plaintiff predicates his case took place in the year 1932. He was arrested in the summer of that year upon informations sworn to before a Justice of the Peace and was bound over to await the action of the grand jury in October of that year.

At the October term the grand jury made a report to the Court which returned no indictment but recommended that the proceedings be deferred and defendant released from custody. The state Court made an order on its trial calendar to that effect directing "Defendant discharged on recommendation of grand jury as per written statement on file." The Clerk of the Court never entered the judgment of dismissal but defendant was in fact discharged from custody and no further proceedings had.

Approximately five years later the petitioner filed a motion in the state Court asking that Court "to correct the record * * * and investigate all the procedure relative to the above entitled cause and make a finding and determination in accordance with the actual facts and the conclusions to be drawn therefrom."

Upon that motion the state Court made a finding of facts substantially in accordance with what we stated above and a finding and determination of law to the effect that the action of the grand jury, together with the entry of the Court, was to completely discharge the defendant in that proceeding and the Court further found as a matter of law that there was no action pending against said defendant (petitioner herein).

It is true the Court also made what was in effect a *nunc pro tunc* order which commanded that the entries which he had made on his calendar in 1932 be placed upon the permanent record of the Court.

Defendants in the trial below and in the Circuit Court of Appeals made two contentions:

(1) That the petitioner Wolfe was in fact discharged in October, 1932 by virtue of the fact that the grand jury to which he was bound over failed to indict and the Court at that time failed to continue his case to a later grand jury and no later grand jury ever assumed to act or had any power to act in the premises. See:

Code Sections 13722 and 14023; also
State v. Brown, 102 N. W., 799; 128 Iowa, 24.
Rector v. Smith, 11 Iowa, 302.

(2) That the decision by the state Court on October 6, 1937, made upon petitioner's own motion as defendant in the proceedings in the state Court was significant for two reasons:

(a) As a *nunc pro tunc* order to correct the record and make it speak the truth as to just exactly what occurred on the earlier date, towit, Oct. 20, 1932. See:

Chariton & Lucas County Nat'l Bank v. Taylor, 213 Iowa, 1206; 240 N. W., 740.
34 Corpus Juris, 74 (Title "Judgments", § 213).
Locher v. Livingston, 168 Iowa, 457; 150 N. W., 614.
Doughty v. Meek, 105 Iowa, 16; 74 N. W., 744.
Day v. Goodwin, 104 Iowa, 374; 73 N. W., 864.
34 Corpus Juris, 81, 82 (Title "Judgments", § 222).
Mahaska County v. Bennett, 150 Iowa, 216; 129 N. W., 838.

(b) As an adjudication of that court having jurisdiction of the parties and of the subject matter and acting upon Wolfe's own motion asking that the Court "investigate all the procedure relative to the above entitled cause and make a finding and determination in accordance with the actual facts and the conclusions to be drawn therefrom."

Respondents respectfully urge that the Court disallow the Petition for Writ of Certiorari.

Respectfully submitted,

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